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No. 85-528

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

RONALD L. GOLDFARB,
Petitioner,

v.

SUPREME COURT OF VIRGINIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION

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October 28, 1985

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Corporate Counsel Association (ACCA), seeks leave to file the attached brief *amicus curiae* in the above action. ACCA has secured permission to file this brief of the petitioner Goldfarb, but not of the Supreme Court of Virginia.

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations, partnerships,

and other organizations in the private sector. ACCA has approximately 6,000 members who are engaged in legal matters arising in a number of jurisdictions. Because *pro hac vice* admissions and the need to associate with local counsel can be excessively burdensome and unnecessarily costly, corporate counsel often seek bar admissions in several states.

The net impact of the Virginia rules limiting motion admission to attorneys who intend to practice full-time in the state is to effectively foreclose in-house attorneys from the motion admissions process. This result will require corporate counsel, who must represent their client in Virginia but do not practice in Virginia on a full-time basis, to take the bar examination. Alternatively, the corporate client would be forced to hire local counsel, even though a particular matter could be handled more effectively by the corporation's inside counsel. Either alternative will result in a wasteful expenditure of corporate resources without providing the client, the state or the public with an overriding benefit.

The question of a lawyer's intention to practice full-time in one state as a qualification for bar admission without examination is of great concern and importance to the members of ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in the states which have such requirements for admission.

Respectfully submitted,

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October 28, 1985

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BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus Curiae, American Corporate Counsel Association, supports the petition for certiorari of Ronald L. Goldfarb, and respectfully requests this Court to issue a writ of certiorari.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active prac-

tice of law as employees of corporations, partnerships, and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 6,000 members who are employed as corporate counsel by some 2,000 organizations.

ACCA seeks to promote rules and procedures concerning access and admission to practice so that corporate counsel can adequately manage corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of a lawyer's intention to practice full-time in one state as a qualification for bar admission in that state without examination is of great concern and importance to the members of ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in the states which have such requirements for admission.

The challenged bar admission requirements do not address attorney competence. Instead, they are artificial barriers to practice which deter the provision of more cost effective legal services to those corporations that use inside counsel. Thus, this case is of significant interest to the members of ACCA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Petitioner and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

The in-house segment of the bar is the most rapidly growing portion of the bar. The nature of corporate practice is that the in-house lawyer will need to represent the client's interests in jurisdictions where he or she has not previously been admitted to practice or has an office.

The net impact of the Virginia rules limiting motion admission to attorneys who intend to practice full-time in the state is to effectively foreclose in-house attorneys from the motion admissions process. This result will require corporate counsel, who must represent their client in Virginia but do not practice in Virginia on a full-time basis, to take the bar examination. Alternatively, the corporate client would be forced to hire local counsel, even though a particular matter could be handled more effectively by the corporation's inside counsel. Either alternative will result in a wasteful expenditure of corporate resources without providing the client, the state or the public with an overriding benefit.

ARGUMENT

THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT UNDULY BURDENS INTERSTATE COMMERCE BY IMPAIRING THE EFFICIENT DELIVERY OF LEGAL SERVICES TO CORPORATIONS AND OTHER ORGANIZATIONS THAT USE INSIDE EMPLOYED COUNSEL WITHOUT PROVIDING AN OVERRIDING PUBLIC BENEFIT.

The Virginia rules do not permit motion admission unless an attorney intends "to practice full time as a member of the Virginia bar." Rule 1A:1(d) of the Supreme Court of Virginia.[1] Those persons who do not intend to practice full-time in Virginia must take and pass the Virginia bar examination. However, because of the manner in which legal services are now being provided to corporations and other private-sector organizations, the Virginia rules bring about in unwarranted increased

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[1] Rule 1A:1(c) requires applicants for admission on motion to be residents of the state. Although ACCA believes that such a requirement is in direct conflict with this Court's decision in *Supreme Court of New Hampshire v. Piper*, —— U.S. ——, 105 S. Ct. 1272 (1985), that question is not presented in this case.

costs for those organizations, resulting in an undue burden on interstate commerce, in violation of the Commerce Clause of the Constitution.

It is clear that states have a substantial interest in regulating admissions to their legal bars. *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979). It is equally clear, however, that if states adopt regulations restricting interstate commerce, then the merits and purposes of those restrictions must be balanced against the nature and extent of the burden on interstate commerce. Under the standard of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), such restrictions will not be upheld if the "burden on . . . commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. In this instance, the Virginia rule poses an excessive burden upon commerce by operating to foreclose motion admission to one group of experienced attorneys while not advancing a legitimate state interest—that is, a competent bar.

1. Virginia rules operate to impair efficient delivery of legal services.

Over the past decade, a growing number of corporations have had an increasing percentage of their legal work performed by attorneys who are corporate employees. The decision to use inside employed counsel can be partly explained on economic grounds, as companies strive to reduce their legal costs. In addition, a number of companies have found that they prefer to have their legal work handled by attorneys who have a detailed knowledge of the company and can handle litigation and other matters more efficiently than by referring the legal business to private firms.

This development underscores a very important point about corporate practice: corporate practice is a national one and few in-house attorneys practice full-time in any one state. In order to represent his or her client effectively, the corporate practictioner must be able to litigate cases in different jurisdictions at the same time. As a

practical matter, this means the attorney may need to be a member of the bar in states other than the one where the attorney resides, has an office, or devotes most of his or her time to practicing law.

Additionally, companies often move their lawyers many times for a variety of reasons, ranging from assuring a greater familiarity with the company's operations to fostering the individual lawyer's professional development within the corporation structure. In order to avoid allegations of unauthorized practice of law, many companies require their attorneys to be members of the bar of the state in which they are physically located as well as that in states in which major legal work takes place. As a result, corporate attorneys often seek admission to the state bar whenever they are transferred, and it is not unusual for some attorneys to be admitted to practice in four or five jurisdictions. Often these attorneys are admitted either on motion or after taking a practitioner's examination, as only 11 states require all applicants to take the entire bar examination. See Hafter, "Toward the Multistate Practice of Law Through Admission by Reciprocity," 53 *Miss L.J.* 1, 44-46 (1983). As a result, full-time practice and similar restrictions place a costly burden on companies trying to build-up an experienced, in-house legal department.

The problem cannot be solved through *pro hac vice* admission for inside counsel. First, this solution applies to court appearances but not to the counselling which an attorney performs. Second, in litigation situations, although some jurisdictions grant for *pro hac vice* admission motions routinely, others can make *pro hac vice* admission a tedious effort. ACCA is aware of courts which have refused the *pro hac vice* admission of corporate practictioners except in unusual circumstances.[2] Some

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[2] *Burlington Cty., Etc. v. American Medicorp.*, 403 A.2d 43 (1979), presents a good example of the extremely burdensome requirements

courts discourage more than a few *pro hac vice* admissions. For example, California requires a lawyer to identify the number of times that he or she has been ad-

---

which corporate counsel must meet when requesting admission *pro hac vice*. In that case the court said:

> The matter is one for the conscientious exercise of my discretion, *Higgins v. Polk*, 14 N.J. 490, 103 A.2d 1 (1954), which requires certain basic information to be supplied by defense counsel. This consists of proof
>
> (1) that foreign counsel is of good standing in his state and is associated with New Jersey counsel of good standing here. A certificate from the official of the State of Pennsylvania authorized to attest to the good standing of attorneys must be submitted with respect to Richard L. Berkman. Good standing of New Jersey counsel is acknowledged;
>
> (2) by affidavit of foreign counsel, that he has maintained his competence as an attorney, particularly in any specialization which he claims, through experience, schools, lectures and readings;
>
> (3) by letter of defendant, that it desires to be represented by Pennsylvania counsel in New Jersey, stating reasons;
>
> (4) good cause, presented in affidavit form, which may consist of:
>
> (a) a showing that the cause involves a complex field of law in which counsel is a specialist,
>
> (b) a long held attorney-client relationship,
>
> (c) lack of local counsel with expertise in the field involved,
>
> (d) the existence of legal questions involving the law of the foreign jurisdiction,
>
> (e) the need for extensive discovery proceedings in the foreign jurisdiction.
>
> [3] In the event the defense request is granted, counsel's admission will be subject to appropriate conditions, to be set forth in the order of admission and consented to by all counsel. These will include requirements that the foreign attorney and his law firm will
>
> (A) be bound by our Rules of Court, including our Disciplinary Rules;
>
> (B) advise the court immediately if he ceases to be an attorney in good standing of the foreign jurisdiction;
>
> [Continued]

mitted *pro hac vice* in the state, and lawyers have been criticized for too many admissions even when representing a corporate employer. Finally, some courts have even used revocation of *pro hac vice* admission as a basis for attempting to force settlement. ACCA is aware of a case in which a general counsel for a major manufacturer was threatened with the revocation of *pro hac vice* admission in a federal court when he refused to settle.

Because of these and other problems, *pro hac vice* admission is simply not a total solution for inside practitioners in a number of jurisdictions. Consequently, many lawyers with a national practice seek to become members of the bar in states where the company has large investments or sales in order to facilitate the handling

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[2] [Continued]

(C) continue to be associated with New Jersey counsel throughout the trial of the cause and to obey the strictures of R.1:21-2;

(D) consent of the service of process upon associated New Jersey counsel in any suit brought against him and his firm arising from his participation in the within cause, with the understanding that such service subjects him to the jurisdiction of this court;

(E) recognize and follow New Jersey customs of practice in addition to its Rules of Court;

(F) conduct all discovery proceedings in New Jersey, through New Jersey counsel, unless opposing counsel agrees to a different arrangement;

(G) not apply for any continuances respecting motions and trials on the ground that he is committed to appear before a court of a foreign jurisdiction, other than a federal court;

(H) file a certificate issued by a responsible insurance company showing that he is covered by adequate malpractice insurance.

On receipt of the required proofs, copies of which are to be forwarded to opposing counsel, I will decide the questions." Id. at 44-45.

of the company's legal business. Admission standards which predicate admission on practicing full-time in the state obviously hinder this process and substantially impair the in-house lawyer's ability to effectively represent his client.

The net result of Virginia's rule is to virtually eliminate in-house counsel's access to the motion admission process in Virginia because the nature of their practice is such that they rarely represent their client's interests exclusively in the state in which they have their office. Moreover, the Virginia rule would effectively exclude in-house practitioners from the motion admission process in Virginia when they do not have an office in Virginia. The restriction therefore places an excessive and unreasonable burden upon interstate commerce.

2. The restrictions are not reasonably related to attorney competency.

Restrictions on practice can be justified only if they have "a rational connection with the applicant's fitness or capacity to practice law." *Schware vs. Board of Bar Examiners,* 353 U.S. 232 (1957). However, the full-time practice requirement does not address attorney competence. This is demonstrated by looking at the rule itself. The rule requires a determination that an applicant for admission on motion "has made such progress in the practice of law that it would be unreasonable to require him to take an examination," Virginia Supreme Court Rule 1A:1(b), or, in other words, a demonstration of competency. The residency and full-time practice requirements set out in clauses (c) and (d) of Rule 1A:1 are requirements in addition to the competency demonstration.

Under operation of the state rule, then, some experienced attorneys will be admitted on motion and others will not, even though the experience of the two groups is identical. The attorneys who will be foreclosed from

motion admission by the rule are experienced practitioners who have already passed a bar examination and have demonstrated competency and fitness to practice and enjoy the confidence of their corporate client.

ACCA does not question the obligation of a state to regulate the legal profession in a manner which assures that members of its bar are competent. That goal is not achieved, however, by the present rule, which discriminates in favor of experienced lawyers who may intend to work for private firms and who therefore may be able to declare an intent to practice full-time in Virginia. The rule clearly discriminates against equally competent and equally experienced corporate practitioners, whose work requires them to handle matters not solely in Virginia, but in other states as well.

CONCLUSION

Full-time practice requirements and similar restrictions do nothing to assure that corporate practitioners will be competent attorneys. The only effect of such restrictions is to unconstitutionally burden interstate commerce by forcing companies to pay higher legal fees because they must send a case to a private firm, even though the matter could be competently handled at lower cost by the company's legal department.

Given there is no rational connection between the restriction and the applicant's fitness or capacity to practice law, the clear and excessive burden upon interstate commerce requires that the restriction be held unconstitutional.

Respectfully submitted,

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October 28, 1985